



FEDERAL RESERVE SYSTEM

12 CFR Part 225

Regulation Y; Docket No. R-1405

RIN 7100-AD64

Definition Of “Predominantly Engaged In Financial Activities.”

AGENCY: Board of Governors of the Federal Reserve System (Board)

ACTION: Supplemental Notice of Proposed Rulemaking and Request for Comment.

SUMMARY: On February 11, 2011, the Board published a notice of proposed rulemaking (“February 2011 NPR”) that would amend Regulation Y to establish the criteria for determining whether a company is “predominantly engaged in financial activities” and define the terms “significant nonbank financial company” and “significant bank holding company” for purposes of Title I of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (the “Dodd-Frank Act” or “Act”). Based on comments received, the Board believes that clarification is needed regarding the scope of activities that would be considered to be financial activities under that proposal. Accordingly, this notice supplements the February 2011 NPR amending specific portions of the regulation for clarity.

DATES: Comments should be received on or before May 25, 2012.

FOR FURTHER INFORMATION CONTACT: Laurie S. Schaffer, Associate General Counsel, (202) 452-2272, Paige E. Pidano, Senior Attorney, (202) 452-2803 or Christine E. Graham, Senior Attorney, (202) 452-3005, Legal Division; Mark Van Der Weide, Senior Associate Director, (202) 452-2263, Division of Banking Supervision and Regulation, Board of Governors of the Federal Reserve System, 20th Street and Constitution Avenue, NW, Washington, DC 20551. Users of Telecommunication Device for Deaf (TDD) only, call (202) 263-4869.

SUPPLEMENTARY INFORMATION:

I. Background

This Notice of Proposed Rulemaking (“NPR”) amends the February 2011 NPR and invites public comment on the definition of activities that are financial solely for purposes of

determining whether a company qualifies as a nonbank financial company under Title I of the Dodd-Frank Act.¹

The Dodd-Frank Act established the Council, which, among other authorities and duties, may require that a “nonbank financial company” become subject to supervision by the Board and prudential standards if the Council determines that the material financial distress of the company, or the nature, scope, size, scale, concentration, interconnectedness, or mix of the company’s activities, could pose a threat to the financial stability of the United States.² Nonbank financial companies that are designated by the Council under section 113 of the Dodd-Frank Act are referred to as “nonbank financial companies supervised by the Board.”³

Title I of the Dodd-Frank Act defines a “nonbank financial company” to include both a U.S. nonbank financial company and a foreign nonbank financial company. The statute, in turn, defines a “U.S. nonbank financial company” as a company (other than a bank holding company and certain other specified types of entities) that is (i) incorporated or organized under the laws of the United States or any State; and (ii) *predominantly engaged in financial activities*.⁴ A “foreign nonbank financial company” is defined as a company (other than a bank holding company or foreign bank or company that is, or is treated as, a bank holding company) that is (i) incorporated or organized outside the United States; and (ii) *predominantly engaged in financial activities*.⁵

¹ The NPR refers to these activities as “activities that are financial in nature under Title I.”

² See section 113 of the Dodd-Frank Act; 12 U.S.C. § 5323.

³ See *id.*

⁴ See section 102(a)(4)(B) of the Dodd-Frank Act (emphasis added); 12 U.S.C. § 5311(a)(4)(B) (emphasis added). Besides bank holding companies, the statute specifically provides that the term “U.S. nonbank financial company” does not include (i) a Farm Credit System institution chartered and subject to the Farm Credit Act of 1971 (12 U.S.C. § 2001 *et seq.*), (ii) a national securities exchange (or parent thereof), clearing agency (or parent thereof, unless the parent is a bank holding company), security-based swap execution facility, or security-based swap data repository that in each case is registered with the SEC, or (iii) a board of trade designated as a contract market (or parent thereof), or a derivatives clearing organization (or parent thereof, unless the parent is a bank holding company), swap execution facility or a swap data repository that in each case is registered with the CFTC.

⁵ See section 102(a)(4)(A) of the Dodd-Frank Act (emphasis added); 12 U.S.C. § 5311(a)(4)(A) (emphasis added). A foreign bank, or foreign company controlling a foreign bank, is treated as a

For purposes of Title I of the Dodd-Frank Act, a company is considered to be “predominantly engaged” in financial activities if either

- (i) the annual gross revenues derived by the company and all of its subsidiaries from activities that are financial in nature (as defined in section 4(k) of the Bank Holding Company Act), and, if applicable, from the ownership or control of an insured depository institution, represents 85 percent or more of the consolidated annual gross revenues of the company; or
- (ii) the consolidated assets of the company and all of its subsidiaries related to activities that are financial in nature (as defined in section 4(k) of the Bank Holding Company Act), and, if applicable, related to the ownership or control of an insured depository institution, represents 85 percent or more of the consolidated assets of the company.⁶

The Dodd-Frank Act requires the Board to establish the requirements for determining whether a company is “predominantly engaged in financial activities.”⁷ In accordance with this requirement, the Board requested comment on the February 2011 NPR that, among other things, set forth the requirements for determining if a company is “predominantly engaged in financial activities” under Title I of the Act.⁸ The public comment period on the proposed rule closed on March 30, 2011.

In light of comments received on the February 2011 NPR, the Board is amending that NPR to clarify the activities that are financial for purposes of Title I.

II. Overview of Comments

The Board received 23 comments on the February 2011 NPR. The comments received by the Board relating to the definition of activities that are financial for purposes of Title I raised questions as to whether the conduct of certain financial activities—in particular, investment activities—that did not comply with the conditions applicable to bank holding companies

bank holding company for purposes of the BHC Act if the foreign bank has a branch, agency, or commercial lending company subsidiary in the United States and does not control a U.S. bank.

⁶ See section 102(a)(6) of the Dodd-Frank Act; 12 U.S.C. § 5311(a)(6).

⁷ Section 102(b) of the Dodd-Frank Act 12 U.S.C. § 5311(b).

⁸ 76 FR 7731 (February 11, 2011). The February 2011 NPR also proposed definitions of the terms “significant nonbank financial company” and “significant bank holding company,” as required by the Dodd-Frank Act. See sections 102(a)(7) and (b) of the Dodd-Frank Act; 12 U.S.C. §§ 5311(a)(7) and (b).

engaging in such activities should be considered to be financial activities for purposes of Title I. The Board intends to provide a complete discussion of the comments submitted in response to the February 2011 NPR after considering the comments received on this second proposal.

The Board has considered the comments it received regarding the definition of activities that are financial in nature for purposes of Title I, as well as the language and legislative intent and history of the Dodd-Frank Act and the Bank Holding Company Act (“BHC Act”), as amended by the Gramm-Leach-Bliley Act (“GLB Act”). Based on these considerations, the Board is proposing to amend the February 2011 NPR to clarify that, consistent with the purpose of Title I any activity referenced in section 4(k) will be considered to be a financial activity without regard to conditions that were imposed on bank holding companies that do not define the activity itself.⁹ To provide clarity, the Board further is issuing as an appendix to the NPR a list of the activities that would be considered to be financial activities as of April 2, 2012, including conditions necessary to the definition of the activity as a financial activity, for purposes of determining whether a company is predominantly engaged in financial activities.

The Board is proposing this approach for several reasons. First, section 4(k) of the BHC Act and Regulation Y, which is incorporated by reference, contain broad lists of financial activities and impose conditions on bank holding companies conducting those activities. Many of these conditions were imposed so that a bank holding company, which, by definition, controls a bank, could engage in the activities without threatening the safety and soundness of its subsidiary depository institution and are distinct from the definition of the activity itself. Other conditions were required to comply with another provision of law, such as the Glass-Steagall Act.

Defining financial activities for purposes of Title I to include all of the conditions imposed on the conduct of the activities by bank holding companies likely would enable some companies that are predominantly engaged in financial activities to avoid consideration for designation by the Council simply by choosing not to abide by conditions that were imposed by the Board on bank holding companies to ensure the safe and sound conduct of the activity or

⁹ As noted below, conditions that do not define the activity itself include those conditions that were imposed to ensure that the activity is conducted in a safe and sound manner, to prevent a financial holding company from controlling a commercial firm, or to comply with another provision of law.

compliance with other legal restrictions unrelated to whether the activity is a financial activity. For example, some commenters suggested that a firm that organizes, sponsors, and manages an open-end investment company (including a mutual fund or money market mutual fund) should not be considered to be engaged in a financial activity if the firm owns or controls more than a given percentage of the fund because a financial holding company may not own or control more than that amount of the fund.

This proposal is consistent with the purpose and legislative history of Title I, which demonstrate that Congress believed that the statutory definition of a “nonbank financial company” would make eligible for Council designation companies that were not bank holding companies but that engaged in a broad range of financial activities.¹⁰ A reading of Title I that limited the scope of companies considered to be “predominantly engaged in financial activities” to only those companies that conduct such activities in compliance with the conditions applicable to bank holding companies would severely undermine the purpose of Title I and the authority granted by Congress to the Council to protect U.S. financial stability by taking certain actions to ensure such stability, such as the authority to subject to prudential standards financial firms that compete in financial markets and could threaten financial stability.¹¹

Second, section 167(a) of the Dodd-Frank Act supports the view that Congress intended that companies could be eligible for designation by the Council regardless of whether these companies complied with the non-definitional conditions applied to bank holding companies in

¹⁰ See remarks by Senator Cardin at 156 Cong. Rec. S5873, July 15, 2010, in which he indicates that mutual funds and their advisers would be eligible for designation by the Council (stating that 115 of the Dodd-Frank Act would “ensure that mutual funds and their advisers are not inadvertently subjected to unworkable standards in the unlikely event the Financial Stability Oversight Council designates [mutual funds] as systemically risky.”); See also remarks by Senator Kerry at 156 Cong. Rec. S5902-5903, July 15, 2010, in which he indicates that although mutual funds and their advisers would be eligible for designation by the Council, regulation by the Board may not be appropriate for such companies because they do not pose a risk to United States financial stability (stating that “there are large companies providing financial services that are in fact traditionally low-risk businesses, such as mutual funds and mutual fund advisers” and that Congress did “not envision nonbank financial companies that pose little risk to the stability of the financial system,” such as “mutual funds and mutual fund advisers,” to be supervised by the Federal Reserve.”).

¹¹ Committee on Banking, Housing, and Urban Affairs Report, S. Rep. No. 111-176, April 15 2010, page 3, citing Testimony of Timothy Geithner, Secretary of the Treasury, to the Banking Committee, June 18, 2009.

the implementation of section 4(k).¹² Section 167(a) provides that a nonbank financial company supervised by the Board “. . . shall not be required to conform its activities to the requirements of section 4 of the BHC Act.”¹³

This section demonstrates that Congress recognized that nonbank financial companies do not conduct their activities in compliance with the requirements applicable to bank holding companies. It would be illogical to conclude that a company would be eligible for Council designation only if it conducted its financial activities in conformance with the requirements imposed on bank holding companies’ conduct of financial activities set forth in section 4(k), but would not be required to conform its financial activities to the conditions imposed on bank holding companies by section 4(k) after being designated by the Council for Board supervision.

Third, the Council’s anti-evasion authority appears to demonstrate Congress’s intent to broadly define “nonbank financial companies” to capture firms predominantly engaged in the type of financial activities authorized by section 4(k). A nonbank company could slightly alter the manner in which it conducts a financial activity so that the activity does not comply with one of the non-definitional conditions that governs the conduct of the activity by a bank holding company to reduce the company’s financial revenues and assets for purposes of the asset and revenue tests set forth in section 102(a)(6). The nonbank company could thereby avoid qualifying as a nonbank financial company and thus be ineligible for consideration by the Council for designation under section 113. Section 113(c) of the Dodd-Frank Act gives the Council the authority to subject the financial activities of any company to supervision by the Board if the Council determines, either on its own or pursuant to a recommendation by the Board, that: (i) the company is organized and operates in such a manner to evade application of Title I of the Dodd-Frank Act; and (ii) material financial distress related to, or the nature, scope, size, scale, concentration, interconnectedness, or mix of, the company’s financial activities would pose a threat to the financial stability of the United States.¹⁴ Companies that are engaged in activities that are financial in nature, but that alter the manner in which they conduct those activities for purposes of evading designation by the Council under section 113 and supervision

¹² See 12 USC § 5367.

¹³ Id.

¹⁴ 12 U.S.C. § 5323(c).

by the Board may be subject to designation by the Council under the special anti-evasion authority in section 113(c).

III. Overview of Proposed Rule

Activities as Defined in Section 4(k)

The proposal would revise section 225.301(d)(1) of the NPR to provide that any activity described in section 4(k) of the BHC Act will be considered financial in nature under Title I regardless of conformance with the conditions applicable to bank holding companies conducting such activity that do not define the financial activity itself.

The proposed appendix would enumerate the activities that will be considered financial in nature as of April 2, 2012. These activities are identical to those in section 4(k) that are permissible for financial holding companies as of such date, but do not include the conditions imposed on the conduct of the activity by a bank holding company that do not describe the financial activity. These financial activities include those activities that were permitted by regulation or order as “closely related to banking” under the BHC Act, permitted as “usual in connection with banking abroad,” under the International Banking Act, and those that were authorized for financial holding companies by the GLB Act in 1999.

In order to distinguish between conditions that are definitional from those that are imposed for other reasons, the Board considered its prior authorizations of permissible financial activities for bank holding companies. For instance, the Board reviewed its 1997 revisions to section 225.28 of Regulation Y that describes activities that are “closely related to banking,” in which the Board removed several of the conditions imposed on bank holding companies conducting these activities. In this release, the Board distinguished between the activities that were “necessary to establish the definition of the permitted activity” and those that were imposed for other purposes, such as “to prevent circumvention of another statute, such as the Glass-Steagall Act.”¹⁵ The 1997 rulemaking is an example of the Board’s use of its longstanding

¹⁵ See 62 FR 9290, 9305 (February 28, 1997). The Board stated that the revisions made by the 1997 release were necessary to remove conditions that “[were] outmoded, [were] superseded by Board order, or [did] not apply to insured depository institutions conducting those same activities,” and the conditions it retained in section 225.28 were “necessary to establish the definition of the permitted activity or to prevent circumvention of another statute, such as the Glass-Steagall Act.” The Board further noted that its “removal of [such] restrictions from the

authority to define the parameters of permissible nonbanking activities for bank holding companies and impose conditions on the conduct of such activities by bank holding companies, and the Board's practice of distinguishing between the activities themselves and the conditions imposed on the conduct of those activities.

The GLB Act authorized certain financial activities and repealed many of the conditions imposed on bank holding companies under section 225.28 for bank holding companies that qualify as financial holding companies. To the extent that an activity was originally authorized by the GLB Act, the Board has reviewed the legislative history of that Act to identify the conditions defining that activity. For instance, the legislative history related to Congress's authorization of "underwriting, merchant, and investment banking activities" distinguishes between the activities themselves and certain conditions imposed on the conduct of these activities by a financial holding company that do not define the activities, such as the requirement that a financial holding company have a securities or insurance affiliate.¹⁶

Because section 4(k) references financial activities that were authorized by the Board under various authorities at different points in time, certain of these financial activities overlap with, or are wholly subsumed by, other financial activities permissible for financial holding companies. For purposes of the proposal, the Board has maintained the complete list of financial activities authorized under section 4(k), including the overlapping and redundant activities. Generally, the Board seeks comment on whether overlapping or redundant financial activities should be combined or removed, as appropriate, solely for purposes of determining whether a nonbank company is predominantly engaged in financial activities, in order to simplify the proposed appendix.

It is possible that the Board may modify, interpret, or authorize activities under section 4(k) of the BHC Act in the future. Thus, the proposed revision to section 225.301(d)(1) would

regulation does not affect the Board's determination that" these activities are "so closely related to banking as to be a proper incident thereto" and thus permissible for bank holding companies.

¹⁶ See Conf. Rep. 106-434, 154 (November 2, 1999). ("The authorization of merchant banking activities as provided in new section 4(k)(4)(H) of the BHCA is designed to recognize the essential role *that these activities* play in modern finance and permits an FHC that has a securities affiliate or an affiliate of an insurance company engaged in underwriting life, accident and health, or property and casualty insurance, or providing and issuing annuities, *to conduct such activities.*") (emphasis added).

clarify that neither the rule nor the appendix would affect the authority of the Board under any other provision of law or regulation to modify these activities or to provide interpretations of section 4(k) in the future, which may affect those activities that are financial in nature under Title I.

The following discussion describes the activities enumerated in the proposed appendix and identifies the conditions imposed by section 4(k) of the BHC Act and the Board's implementing regulations that are not reflected in the proposed appendix because they do not define the essential nature of the activity.

- ***Lending, exchanging, transferring, investing for others, or safeguarding money and securities***

The activities of lending, exchanging, transferring, investing for others, or safeguarding money and securities were authorized as permissible for financial holding companies by the GLB Act.¹⁷

- ***Insurance activities***

A broad range of insurance activities, including insuring, guaranteeing, or indemnifying against loss, harm, damage, illness, disability, or death, or providing and issuing annuities, and acting as principal, agent, or broker for purposes of the foregoing, in any State, were authorized as permissible for financial holding companies by the GLB Act.¹⁸

- ***Financial, investment, and economic advisory services***

The activities of providing investment, financial, or economic advisory services were authorized as permissible for financial holding companies by the GLB Act.¹⁹

- ***Securitizing***

The activity of issuing or selling instruments representing interests in pools of assets was authorized as permissible for financial holding companies by the GLB Act.²⁰ The GLB Act also imposed the condition that the assets being securitized must be permissible for a bank to hold directly. This condition appears to address both safety and soundness matters and restrictions

¹⁷ 12 U.S.C. § 1843(k)(4)(A).

¹⁸ 12 U.S.C. § 1843(k)(4)(B).

¹⁹ 12 U.S.C. § 1843(k)(4)(C).

²⁰ 12 U.S.C. § 1843(k)(4)(D).

imposed by other provisions of law unrelated to the financial nature of the activity, and is not reflected in the proposed appendix.

- ***Underwriting, dealing, and market making***

The activities of underwriting, dealing in, and making a market in securities were authorized as permissible for financial holding companies by the GLB Act.²¹

- ***Extending credit and servicing loans***

The activities of making, acquiring, brokering, or servicing loans or other extensions of credit (including factoring, issuing letters of credit and accepting drafts) for the company's account or for the account of others were authorized by the Board as activities that are closely related to banking and thus permissible for bank holding companies.²² The Board requests comment on whether these lending activities are included in the broad authorization of lending under section 4(k)(4)(A) and need not be separately reflected in the appendix.

- ***Activities related to extending credit***

Activities usual in connection with making, acquiring, brokering, or servicing loans or other extensions of credit were determined to be permissible by the Board for bank holding companies as activities that are closely related to banking.²³ These activities include performing appraisals of real estate and personal property (including securities), acting as an intermediary for commercial or industrial real estate financing, providing check guarantee services, providing collection agency services, providing credit bureau services, engaging in asset management, servicing, and collection activities, acquiring debt in default, and providing real estate settlement services.²⁴ The proposed appendix reflects these activities without the conditions imposed on the conduct of these activities by a bank holding company that do not describe the financial activities themselves.

For instance, under the Board's regulations, a bank holding company may not have an interest in, participate in managing or developing, or promote or sponsor the development of the property for which it is arranging commercial real estate equity financing. The proposed

²¹ 12 U.S.C. § 1843(k)(4)(E).

²² 12 U.S.C. § 1843(k)(4)(F); 12 CFR 225.28(b)(1).

²³ 12 U.S.C. § 1843(k)(4)(F); 12 CFR 225.28(b)(2).

²⁴ Id.

appendix does not reflect these conditions because they are not essential to the activity of arranging commercial real estate equity financing.²⁵ Similarly, under the Board's regulations, bank holding companies conducting asset management activities may engage in these activities only if the company does not also engage in real property management or real estate brokerage. The proposed appendix does not reflect that condition because, for purposes of determining whether a company is predominantly engaged in financial activities, the restriction could be read to exclude any asset management activity from being treated as financial if the company also engaged in any real estate brokerage or property management activities. While neither real estate brokerage nor real estate management is a permissible financial activity for financial holding companies, nor are such activities considered to be financial for purposes of Title I, a company may engage in these activities and still be predominantly engaged in financial activities so long as these activities comprise no more than fifteen percent of the company's activities.

With respect to acquiring debt in default, under the Board's regulations, a bank holding company acquiring debt in default must divest impermissible assets securing debt in default within a certain time period, stand only in the position of a creditor and not purchase equity of obligors of debt in default, and not acquire debt in default secured by shares of a bank or bank holding company. The proposed appendix does not reflect these conditions because they do not appear to be part of the essential nature of the activity of acquiring debt in default. The conditions requiring the bank holding company to divest impermissible assets and stand only in the position of a creditor and not purchase equity of obligors are intended to prevent the bank holding company from owning assets prohibited by the BHC Act or other provisions of law and are not related to the activity of acquiring debt in default. Similarly, the condition requiring that the debt not be secured by shares of a bank or bank holding company was imposed to prevent the bank holding company from circumventing the BHC Act's requirement that a bank holding company obtain approval from the Board before acquiring control of another bank or bank holding company.

²⁵ Neither real estate brokerage nor real estate management is an activity that is financial in nature. See 12 U.S.C. § 1843 note; Pub. Law 111-8, sec. 624 (Mar. 11, 2009).

- ***Leasing***

Leasing personal or real property, and acting as an agent, broker, or adviser for personal or real property was determined to be closely related to banking by the Board.²⁶

- ***Operating nonbank depository institutions***

The activities of owning, controlling, and operating nonbank depository institutions, including industrial banks, Morris Plan banks, industrial loan companies and thrifts, was determined to be closely related to banking by the Board.²⁷ While the Board's regulations require that a target thrift be engaged only in deposit-taking activities and activities permissible for bank holding companies, the proposed appendix does not include these conditions because they are not essential elements of the activity of owning a nonbank depository institution.

- ***Trust company functions***

The activities performed by a trust company were determined to be closely related to banking by the Board.²⁸ The Board requests comment on whether trust company functions are incorporated in the broad authorization provided under section 4(k)(4)(A) to engage in lending, exchanging, transferring, investing for others, and safeguarding financial assets and need not be separately reflected in the appendix.

- ***Financial and investment advisory activities***

The activities of acting as an investment or financial advisor to any person were determined to be closely related to banking by the Board.²⁹ These activities have been defined to include, without limitation, serving as a registered investment adviser to a registered investment company, including sponsoring, organizing, and managing a closed-end investment company; furnishing general economic information and advice, general economic statistical forecasting services, and industry studies; providing advice in connection with mergers, acquisitions, divestitures, investments, joint ventures, leveraged buyouts, recapitalizations, capital structurings, financing transactions and similar transactions; and conducting financial feasibility studies; providing information, statistical forecasting, and advice with respect to any transaction

²⁶ 12 U.S.C. § 1843(k)(4)(F); 12 CFR 225.28(b)(3).

²⁷ 12 U.S.C. § 1843(k)(4)(F); 12 CFR 225.28(b)(4).

²⁸ 12 U.S.C. § 1843(k)(4)(F); 12 CFR 225.28(b)(5).

²⁹ 12 U.S.C. § 1843(k)(4)(F); 12 CFR 225.28(b)(6).

in foreign exchange, swaps, and similar transactions, commodities, and any forward contract, option, future, option on a future, and similar instruments; providing educational courses and instructional materials to consumers on individual financial management matters; and providing tax-planning and tax-preparation services to any person.³⁰ The Board requests comment on whether these financial and investment advisory activities are incorporated in the broad authorization provided by section 4(k)(4)(C) of the BHC Act to provide financial, investment, and economic advisory services and need not be separately reflected in the appendix.

- ***Agency transactional services***

Agency transactional services, including providing securities brokerage services, acting as a riskless principal, providing private placement services, and acting as a futures commission merchant, were determined to be closely related to banking by the Board.³¹ Conditions that were imposed on bank holding companies conducting these activities in order to prevent circumvention of the Glass-Steagall Act or for safety and soundness reasons are not reflected in the proposed appendix.

For instance, bank holding companies providing securities brokerage services under this authority are limited to buying and selling securities solely as agent for the account of customers and not conducting securities underwriting or dealing activities, those providing private placement services under this authority cannot purchase or repurchase for their own account the securities being placed or hold in inventory unsold portions of issues of those securities, and those acting as riskless principal under this authority are subject to conditions with respect to bank-ineligible securities. These conditions were intended to prevent a bank holding company from using securities brokerage or riskless principal authority to engage in activities that were impermissible under the Glass-Steagall Act.³²

In order to act as a futures commission merchant, a bank holding company must conduct the activity through a separately incorporated subsidiary, the contract must be traded on an exchange, and the parent bank holding company cannot guarantee that subsidiary's liabilities. The proposed appendix does not reflect these conditions, as they were imposed for safety and

³⁰ *Id.*

³¹ 12 U.S.C. § 1843(k)(4)(F); 12 CFR 225.28(b)(7).

³² 62 FR 9290, 9308.

soundness reasons to limit the bank holding company's exposure to contingent obligations under the loss sharing rules of exchange clearinghouses in order to preserve the holding company's ability to serve as a source of strength to its insured depository institutions.³³

In order to provide agent transactional services to customers on certain commodity derivatives transactions, the derivative must relate to a commodity that is traded on an exchange (regardless of whether the contract being traded is traded on an exchange). The proposed appendix does not reflect this limitation because it appears to have been imposed for safety and soundness reasons and does not describe the underlying activity of providing transactional services on commodity derivatives transactions. The Board requests comment on whether the agency transactional services discussed above are included in the broad authorization provided under section 4(k)(5) to engage in arranging, effecting, or facilitating financial transactions for the account of third parties and need not be separately reflected in the appendix.

- ***Investment transactions as principal***

Engaging in investment transactions as principal, including underwriting and dealing in government obligations and money market instruments and investing and trading as principal in foreign exchange and derivatives, and buying and selling bullion, are activities that were determined to be closely related to banking by the Board.³⁴ Under the Board's regulations, bank holding companies engaged in underwriting and dealing in government obligations and money market instruments are subject to the same conditions imposed on member banks engaged in these activities. The proposed appendix does not reflect these conditions because they were intended to prevent circumvention of the Glass-Steagall Act. In addition, under the Board's regulations, bank holding companies engaged in derivatives transactions are subject to certain conditions, including that the derivative contract itself cannot be a bank-ineligible security and either that the asset underlying the contract be a bank permissible asset or that the contract contain protections against physical settlement. The proposed appendix does not include these conditions imposed on derivatives activities because these conditions appear to have been imposed to prevent circumvention of the Glass-Steagall Act's limitations on underwriting and dealing activities and for safety and soundness reasons.

³³ Id. at 9309.

³⁴ 12 U.S.C. § 1843(k)(4)(F); 12 CFR 225.28(b)(8).

The Board requests comment on whether the activity of underwriting and dealing in government obligations and money market instruments is included in the broad authorization provided under section 4(k)(4)(E) to engage in underwriting, dealing in, or making a market in securities and need not be separately reflected in the appendix.

- ***Management consulting and counseling activities***

Providing management consulting services on any matter to unaffiliated depository institutions and on any financial, economic, accounting, or audit matter to any other company was determined to be closely related to banking by the Board.³⁵ Under the Board's regulations, bank holding companies engaged in management consulting activities may not own more than 5 percent of the client institution or have a management interlock. The proposed appendix does not reflect this condition because it was intended to ensure that a bank holding company does not exercise control over a client company through a management consulting contract and to prevent conflicts of interest.³⁶ The Board requests comment on whether the activity of management consulting is subsumed by the broader authority to engage in management consulting services that was determined to be usual in connection with banking abroad and need not be separately reflected in the appendix.

Providing employee benefits consulting services was determined to be closely related to banking by the Board³⁷ and is included in the proposed appendix. Providing career counseling services also was determined to be closely related to banking by the Board,³⁸ subject to the conditions that the services are provided to a financial organization, to individuals who are seeking employment at a financial institution, or to individuals currently employed in or who are seeking positions in the finance, accounting, and audit departments of any company. These conditions appear to be essential to this activity's being considered financial and thus are included in the definition of the financial activity in the proposed appendix.

³⁵ 12 U.S.C. § 1843(k)(4)(F); 12 CFR 225.28(b)(9)(i).

³⁶ 62 FR 9290, 9312.

³⁷ 12 U.S.C. § 1843(k)(4)(F); 12 CFR 225.28(b)(9)(ii).

³⁸ 12 U.S.C. § 1843(k)(4)(F); 12 CFR 225.28(b)(9)(iii).

- ***Courier services and printing and selling MICR-encoded items***

Providing courier services for certain instruments and audit and accounting media was determined to be closely related to banking by the Board.³⁹ Printing and selling MICR-encoded items was determined to be closely related to banking by the Board.⁴⁰ These activities are included in the proposed appendix.

- ***Insurance agency and underwriting***

Activities related to the provision of credit insurance and insurance in small towns were determined to be closely related to banking by the Board.⁴¹ The Board requests comment on whether these insurance activities are included in the broad authorization of insurance activities provided under section 4(k)(4)(B) of the BHC Act and thus need not be separately reflected in the appendix.

- ***Community development activities***

Making debt and equity investments in corporations or projects that are designed primarily to promote community welfare, and providing advisory and related services for such programs, was determined to be closely related to banking by the Board.⁴² This activity is included in the proposed appendix.

- ***Money orders, savings bonds, and traveller's checks***

The issuance and sale of money orders and traveller's checks, and the issuance of savings bonds, was determined to be closely related to banking by the Board and is included in the proposed appendix.⁴³

- ***Data processing***

Providing data processing services and related activities with respect to financial, banking, or economic data was determined to be closely related to banking by the Board.⁴⁴ Under the Board's regulations, a bank holding company's data processing activities must comply

³⁹ 12 U.S.C. § 1843(k)(4)(F); 12 CFR 225.28(b)(10)(i).

⁴⁰ 12 U.S.C. § 1843(k)(4)(F); 12 CFR 225.28(b)(10)(ii).

⁴¹ 12 U.S.C. § 1843(k)(4)(F); 12 CFR 225.28(b)(11).

⁴² 12 U.S.C. § 1843(k)(4)(F); 12 CFR 225.28(b)(12).

⁴³ 12 U.S.C. § 1843(k)(4)(F); 12 CFR 225.28(b)(13).

⁴⁴ 12 U.S.C. § 1843(k)(4)(F); 12 CFR 225.28(b)(14).

with the condition that the hardware provided in connection with these services is offered only in conjunction with software related to the processing, storage, and transmission of financial, banking, or economic data, and where the general purpose hardware does not constitute more than 30 percent of the cost of any packaged offering. The proposed appendix does not include these conditions because they do not define the activity of financial data processing.

- ***Mutual fund advisory services***

Providing administrative and other services to mutual funds was determined be closely related to banking by the Board⁴⁵ and is included in the proposed appendix.

- ***Owning shares of a securities exchange***

Owning shares of a securities exchange was determined to be closely related to banking by the Board⁴⁶ and is included in the proposed appendix.

- ***Certification services***

Acting as a certification authority for digital signatures and authenticating the identity of persons conducting financial and nonfinancial transactions was determined to be closely related to banking by the Board⁴⁷ and is included in the proposed appendix.

- ***Providing employment histories***

Providing employment histories to third parties for use in making credit decisions and to depository institutions and their affiliates for use in the ordinary course of business was determined to be closely related to banking by the Board⁴⁸ and is included in the proposed appendix.

- ***Check-cashing and wire-transmission services***

Providing check-cashing and wire-transmission services was determined to be closely related to banking by the Board⁴⁹ and is included in the proposed appendix.

⁴⁵ 12 U.S.C. § 1843(k)(4)(F); 12 CFR 225.86(a)(2)(i).

⁴⁶ 12 U.S.C. § 1843(k)(4)(F); 12 CFR 225.86(a)(2)(ii).

⁴⁷ 12 U.S.C. § 1843(k)(4)(F); 12 CFR 225.86(a)(2)(iii).

⁴⁸ 12 U.S.C. § 1843(k)(4)(F); 12 CFR 225.86(a)(2)(iv).

⁴⁹ 12 U.S.C. § 1843(k)(4)(F); 12 CFR 225.86(a)(2)(v).

- ***Postage, vehicle registration, public transportation services***

Providing notary-public services, selling postage stamps and postage-paid envelopes, providing vehicle registration services, and selling public-transportation tickets and tokens in connection with offering banking services was determined to be closely related to banking by the Board⁵⁰ and is included in the proposed appendix.

- ***Real estate title abstracting***

Engaging in real estate title abstracting was determined to be closely related to banking by the Board⁵¹ and is included in the proposed appendix.

- ***Management consulting services***

Providing management consulting services was determined to be usual in connection with the transaction of banking or other financial operations abroad.⁵² Under the Board's regulations, bank holding companies are prohibited from controlling the person to which the services are provided. The proposed appendix does not reflect this condition because it appears to have been intended to ensure that a bank holding company does not exercise control over a client company through a management consulting contract and to prevent conflicts of interest.

- ***Travel agency***

Operating a travel agency in connection with financial services was determined to be usual in connection with the transaction of banking or other financial operations abroad⁵³ and is included in the proposed appendix.

- ***Mutual fund activities***

Organizing, sponsoring, and managing a mutual fund was determined to be usual in connection with the transaction of banking or other financial operations abroad.⁵⁴ Under the Board's regulations, bank holding companies are prohibited from exerting managerial control over the companies in which the fund invests and must reduce their ownership to less than 25 percent of the equity of the fund within one year of sponsoring the fund. The proposed appendix

⁵⁰ 12 U.S.C. § 1843(k)(4)(F); 12 CFR 225.86(a)(2)(vi).

⁵¹ 12 U.S.C. § 1843(k)(4)(F); 12 CFR 225.86(a)(2)(vii).

⁵² 12 U.S.C. § 1843(k)(4)(G); 12 CFR 225.86(b)(1).

⁵³ 12 U.S.C. § 1843(k)(4)(G); 12 CFR 225.86(b)(2).

⁵⁴ 12 U.S.C. § 1843(k)(4)(G); 12 CFR 225.86(b)(3).

does not reflect these conditions because they were imposed to prevent circumvention of the investment restrictions in the BHC Act.

- ***Merchant banking***

Section 4(k)(4)(H) of the BHC Act authorizes financial holding companies to acquire “shares, assets or ownership interests,” including debt or equity securities, in a company engaged in any activity not authorized under section 4 “as part of a bona fide underwriting or merchant or investment banking activity, including investment activities engaged in for the purpose of appreciation and ultimate resale or disposition of the investment,” subject to the following conditions: (i) the shares may not be acquired or held by a depository institution; (ii) the shares must be acquired and held by a securities affiliate or an affiliate thereof, or in the case of a financial holding company that has an insurance company affiliate, the shares must be acquired and held by an affiliate that provides investment advice to an insurance company and is registered pursuant to the Investment Advisers Act of 1940, or an affiliate thereof, as part of a bona fide underwriting or merchant or investment banking activity, including investment activities engaged in for the purpose of appreciation and ultimate resale or disposition of the investment; (iii) the shares must be held for a period of time to enable the sale or disposition on a reasonable basis consistent with the financial viability of the company’s underwriting, merchant, or investment banking activities; and (iv) during the period the shares are held, the bank holding company may not routinely manage or operate the company except as may be necessary to obtain a reasonable return on investment upon resale or disposition.⁵⁵

The proposed appendix reflects those conditions that appear to define the essential nature of the activities of underwriting, merchant, or investment banking activities, and omits those that do not.

First, the condition requiring that the shares be held for a period of time to enable their sale or disposition on a reasonable basis consistent with the financial viability of the company’s underwriting, merchant, or investment banking activities appears to be an essential element of a bona fide underwriting, merchant, or investment banking activity. Thus, this condition is reflected in the proposed appendix. Companies engaging in bona fide underwriting, merchant, or investment banking activities do not invest in investee companies for the purpose of engaging in

⁵⁵ 12 U.S.C. § 1843(k)(4)(H).

the activity in which the investee company is engaged, but instead invest with the intent to sell such instruments at some later point in time at which a profit is expected to be realized. The length of time that the shares are held will vary by investment.⁵⁶

For example, certain companies, such as private equity firms, that are engaged in bona fide underwriting, merchant, or investment banking activities typically invest in firms that the private equity firm believes will increase in value over time and can be resold at a profit. The holding period for an investment will vary based on the investee company, and in some cases the private equity firm may hold the shares for several years. A firm such as a hedge fund or a mutual fund invests in firms with the expectation to sell those instruments at a future date in order to realize profits consistent with its particular investment strategy. The holding period for an investment by a hedge fund or a mutual fund will depend on the length of time necessary to recognize gains consistent with the fund's investment strategy.

The prohibition on routinely managing an investee company in which it has purchased shares, other than for purposes of recognizing a reasonable return, appears to be an essential element of bona fide underwriting, merchant, or investment banking activities. Thus, this prohibition is reflected in the proposed appendix. As previously discussed, companies engaging in these activities purchase shares of investee companies to recognize an ultimate profit, rather than to engage in the underlying activity in which the investee company engages as its primary business activity. Routinely managing the companies, other than for the goal of recognizing a reasonable return, would be inconsistent with the underlying nature of the activities. Therefore, in order for an activity to qualify as a bona fide underwriting, merchant, or investment banking activity, a nonbank company must comply with this restriction.⁵⁷

⁵⁶ The Board and the Secretary of the Treasury jointly implemented regulations interpreting the holding period for merchant banking investments by financial holding companies. This regulatory interpretation is separate from the activity of merchant banking set forth in section 4(k)(4)(H) of the BHC Act and would not apply for determining whether an activity is a financial activity for purposes of Title I. See 12 CFR 225.172 and 12 CFR 1500.3, respectively.

⁵⁷ The Board and the Secretary of the Treasury jointly implemented regulations interpreting the limitation on routine management and operation for merchant banking investments by financial holding companies. This regulatory interpretation is separate from the activity of merchant banking set forth in section 4(k)(4)(H) of the BHC Act and would not apply for determining whether an activity is a financial activity for purposes of Title I. See 12 CFR 225.171 and 12 CFR 1500.2 et seq., respectively.

By contrast, the condition requiring that shares acquired as part of a bona fide underwriting or merchant or investment banking activity not be acquired or held by a depository institution is not an essential element of such activities, and thus is not reflected in the proposed appendix. This restriction was imposed because banks are restricted from investing in certain types of companies by statute and regulation.⁵⁸ Similarly, the condition in section 4(k) requiring a financial holding company engaging in underwriting or merchant or investment banking activities to either have (i) a securities affiliate, or (ii) in the case of a financial holding company that has an insurance company affiliate, an affiliate that provides investment advice to an insurance company and is registered pursuant to the Investment Advisers Act of 1940, does not appear to be an essential element of these activities because the condition does not require that the activity be conducted through the securities affiliate or investment adviser affiliate of the financial holding company. The condition was designed to ensure that only those financial holding companies with experience engaging in underwriting, merchant, or investment banking activities conducted such activities. The Board proposes to define the activities of underwriting, merchant, and investment banking to include only the conditions that appear to be essential elements of the activities themselves, as discussed above.⁵⁹

In addition, the proposed appendix does not reflect the provision of section 4(k)(4)(H) that the investment be in company engaged in any activity not authorized under section 4 of the BHC Act because this provision does not affect the scope of activities that are financial activities for purposes of Title I. An investment in a company solely engaged in activities permissible under section 4 would otherwise be treated as a financial activity.

Section 4(k)(4)(I) of the BHC Act similarly authorizes financial holding companies to acquire “shares, assets or ownership interests,” including debt or equity securities, of a company or other entity engaged in any activity not authorized by section 4(k) if (i) the shares, assets, or ownership interests are not acquired or held by a depository institution or a subsidiary of a

⁵⁸ See, e.g., 12 U.S.C. § 24, (Seventh); 12 U.S.C. § 24, (Eleventh); 12 CFR 1.

⁵⁹ Similarly, the Council has indicated its belief that nonbank companies such as hedge funds, private equity firms, and mutual funds will be eligible for designation. The Council noted in its second notice of proposed rulemaking that it will consider whether to establish an additional set of metrics or thresholds tailored to evaluate hedge funds and private equity firms and their advisers for potential designation under section 113. See 76 FR 64264, 64269 (October 18, 2011).

depository institution; (ii) such shares, assets, or ownership interests are acquired and held by an insurance company that is predominantly engaged in underwriting life, accident and health, or property and casualty insurance (other than credit-related insurance) or providing and issuing annuities; (iii) such shares, assets, or ownership interests represent an investment made in the ordinary course of business of such insurance company in accordance with relevant State law governing such investments; and (iv) during the period such shares, assets, or ownership interests are held, the bank holding company does not routinely manage or operate such company except as may be necessary or required to obtain a reasonable return on investment.

The condition requiring that shares, assets, or ownership interests not be acquired or held by a depository institution does not appear to be an essential element of the investment activities authorized by section 4(k)(4)(I), and thus is not reflected in the proposed appendix. This restriction was imposed because banks are restricted from investing in certain types of companies by statute and regulation.⁶⁰ Each of the other conditions imposed on the conduct of the activity by a bank holding company appears to be an essential element of the activity of investing in connection with engaging in insurance activities. The Board proposes to define the investment activities authorized by section 4(k)(4)(I) to include only the conditions that appear to be essential elements of these activities, as discussed above.

- ***Lending, safeguarding, exchanging, and investing for others with respect to financial assets other than money and securities***

The GLB Act authorizes the activities of lending, exchanging, transferring, investing for others, or safeguarding financial assets other than money or securities; providing any device or other instrumentality for transferring money or other financial assets; and arranging, effecting, or facilitating financial transactions for the account of third parties for financial holding companies.⁶¹ The statute requires the Board to define these activities as financial in nature and the extent to which such activities are financial in nature or incidental thereto. The Board and the Secretary of the Treasury issued a joint interim rule authorizing such activities as permissible for financial holding companies.⁶² These activities are included in the proposed appendix.

⁶⁰ See, e.g., 12 U.S.C. § 24, (Seventh); 12 U.S.C. § 24, (Eleventh), 12 CFR 1.

⁶¹ 12 U.S.C. § 1843(k)(5).

⁶² See 66 Fed. Reg. 257 (January 3, 2001).

Implications for Bank Holding Companies

The Board is proposing to define the activities listed in the proposed appendix as financial solely for purposes of Title I of the Dodd-Frank Act. The proposed appendix is not intended to amend section 4(k) of the BHC Act for purposes of defining those activities that are permissible for financial holding companies or the manner in which bank holding companies and financial holding companies are permitted to conduct those activities. The Board notes that it does not have the authority to unilaterally expand the list of permissible financial activities under section 4(k) as it applies to financial holding companies without first consulting with the Secretary of the Treasury.⁶³ In making its determination, the Board also must take into account four factors: (1) The purposes of the GLB Act and BHC Act; (2) the changes or reasonably expected changes in the marketplace in which financial holding companies compete; (3) the changes or reasonably expected changes in technology for delivering financial services; and (4) whether the proposed activity is necessary or appropriate to allow a financial holding company to compete effectively with companies seeking to provide financial services in the United States, efficiently deliver financial information and services through technological means, and offer customers any available or emerging technological means for using financial services or for the document imaging of data.⁶⁴ Additionally, Congress clearly did not intend to expand the list of permissible financial activities for bank holding companies in enacting the Dodd-Frank Act. In fact, Congress demonstrated a clear intent to restrict the conduct of financial activities by bank holding companies and other companies affiliated with depository institutions, as evidenced by the new restrictions imposed by section 619 of the Act (the “Volcker Rule”) on certain financial activities, such as securities underwriting and dealing, conducted by bank holding companies and other depository institution affiliates.⁶⁵

⁶³ 12 U.S.C. § 1843(k)(2).

⁶⁴ 12 U.S.C. § 1843(k)(3).

⁶⁵ See 12 U.S.C. § 1851.

IV. Administrative Law Matters

A. Paperwork Reduction Act

In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. Ch. 3506; 5 CFR 1320 Appendix A.1), the Board reviewed this NPR under the authority delegated to the Board by the Office of Management and Budget (“OMB”).

As noted in the Supplementary Information, the Board published the February 2011 NPR to amend the sections of Regulation Y that establish the criteria for determining whether a company is “predominantly engaged in financial activities” and define the terms “significant nonbank financial company” and “significant bank holding company” for purposes of Title I of the Dodd-Frank Act. The comment period for the February 2011 NPR closed on March 30, 2011; the Board received 23 comment letters. Based on comments received, the Board believes that clarification is needed regarding the scope of activities that would be considered to be financial activities under that proposal.

Although this NPR supplements the February 2011 NPR by amending specific portions of the regulation for clarity, it does not affect the collections of information that are proposed by the February 2011 NPR that are found in 12 CFR 225.301(f). This NPR proposes no new collections nor makes any revisions to the collections that were proposed under the February 2011 NPR.

The Board may not conduct or sponsor, and an organization is not required to respond to, this information collection unless it displays a currently valid OMB control number. The OMB control number will be assigned once the rulemaking has been finalized.

B. Regulatory Flexibility Act

In accordance with Section 3(a) of the Regulatory Flexibility Act, 5 U.S.C. 601 et seq. (“RFA”), the Board is publishing an initial regulatory flexibility analysis with this rulemaking. The RFA requires an agency either to provide an initial regulatory flexibility analysis with a proposed rule for which a general notice of proposed rulemaking is required or to certify that the proposed rule will not have a significant economic impact on a substantial number of small entities.

As noted in the Supplementary Information, the Board published the February 2011 NPR to amend the sections of Regulation Y that establish the criteria for determining whether a company is “predominantly engaged in financial activities” and define the terms “significant

nonbank financial company” and “significant bank holding company” for purposes of Title I of the Dodd-Frank Act. The comment period for the February 2011 NPR closed on March 30, 2011; the Board received 23 comment letters. Based on comments received, the Board believes that clarification is needed regarding the scope of activities that would be considered to be financial activities under that proposal. Although this NPR supplements the February 2011 NPR by amending specific portions of that proposal for clarity, it does not affect the Board’s initial regulatory flexibility analysis with respect to the February 2011 NPR. A final regulatory flexibility analysis will be conducted after consideration of comments received during the public comment period.

List of Subjects in 12 CFR Part 225

Administrative practice and procedure, Banks, banking, Holding companies, Reporting and recordkeeping requirements, Securities

Authority and Issuance

For the reasons stated in the preamble, the Board proposes to further amend Regulation Y, 12 CFR part 225, as proposed to be amended at 76 FR 7731 (February 11, 2011), as follows:

PART 225 - BANK HOLDING COMPANIES AND CHANGE IN BANK CONTROL (REGULATION Y)

1. The authority citation for part 225 is revised to read as follows:

Authority: 12 U.S.C. 1844(b), 3106 and 3108, 1817(j)(13), 1818(b)), 1831i, 1972, Pub. L. 98–181, title IX, and 5311(a)(6) and (b).

2. In § 225.301 which was proposed to be added on February 11, 2011 at 76 FR 7731, is further amended by revising paragraph (d)(1) as follows:

§ 225.301 Nonbank companies “predominantly engaged” in financial activities.

* * * * *

(d) *Activities that are financial in nature.*

(1) In general. Any activity described in section 4(k) of the BHC Act, regardless of conformance with the conditions applicable to financial holding companies conducting such activity that do not define the financial activity, shall be considered financial in nature for purposes of this section. These activities as of April 2, 2012 are set forth in the appendix. Nothing in this part

limits the authority of the Board under any other provision of law or regulation to modify the activities it has determined to be financial in nature or to provide interpretations of section 4(k) of the BHC Act.

* * * * *

3. Add Appendix A to Subpart N to read as follows:

Appendix A to Subpart N - Financial Activities for Purposes of Title I

- (1) Lending, exchanging, transferring, investing for others, or safeguarding money and securities.
- (2) Insuring, guaranteeing, or indemnifying against loss, harm, damage, illness, disability, or death, or providing and issuing annuities, and acting as principal, agent, or broker for purposes of the foregoing, in any state.
- (3) Providing financial, investment, or economic advisory services, including advising an investment company (as defined in section 3 of the Investment Company Act of 1940).
- (4) Issuing or selling instruments representing interests in pools of assets.
- (5) Underwriting, dealing in, or making a market in securities.
- (6) Extending credit and servicing loans. Making, acquiring, brokering, or servicing loans or other extensions of credit (including factoring, issuing letters of credit and accepting drafts) for the company's account or for the account of others.
- (7) Activities related to extending credit. Any activity usual in connection with making, acquiring, brokering or servicing loans or other extensions of credit, including the following activities:
 - (i) Real estate and personal property appraising. Performing appraisals of real estate and tangible and intangible personal property, including securities.
 - (ii) Arranging commercial real estate equity financing. Acting as intermediary for the financing of commercial or industrial income-producing real estate by arranging for the transfer of the title, control, and risk of such a real estate project to one or more investors.
 - (iii) Check-guaranty services. Authorizing a subscribing merchant to accept personal checks tendered by the merchant's customers in payment for goods and services, and purchasing from the merchant validly authorized checks that are subsequently dishonored.
 - (iv) Collection agency services. Collecting overdue accounts receivable, either retail or commercial.

- (v) Credit bureau services. Maintaining information related to the credit history of consumers and providing the information to a credit grantor who is considering a borrower's application for credit or who has extended credit to the borrower.
- (vi) Asset management, servicing, and collection activities. Engaging under contract with a third party in asset management, servicing, and collection¹ of assets of a type that an insured depository institution may originate and own.
- (vii) Acquiring debt in default. Acquiring debt that is in default at the time of acquisition.
- (viii) Real estate settlement servicing. Providing real estate settlement services.²
- (8) Leasing personal or real property. Leasing personal or real property or acting as agent, broker, or adviser in leasing such property if:
 - (i) The lease is on a nonoperating basis;³
 - (ii) The initial term of the lease is at least 90 days; and
 - (iii) In the case of leases involving real property:
 - (A) At the inception of the initial lease, the effect of the transaction will yield a return that will compensate the lessor for not less than the lessor's full investment in the property plus the estimated total cost of financing the property over the term of the lease from rental payments, estimated tax benefits, and the estimated residual value of the property at the expiration of the initial lease; and

¹ Asset management services include acting as agent in the liquidation or sale of loans and collateral for loans, including real estate and other assets acquired through foreclosure or in satisfaction of debts previously contracted.

² For purposes of this section, real estate settlement services do not include providing title insurance as principal, agent, or broker.

³ The requirement that the lease be on a nonoperating basis means that the company may not, directly or indirectly, engage in operating, servicing, maintaining, or repairing leased property during the lease term. For purposes of the leasing of automobiles, the requirement that the lease be on a nonoperating basis means that the company may not, directly or indirectly: (1) Provide servicing, repair, or maintenance of the leased vehicle during the lease term; (2) purchase parts and accessories in bulk or for an individual vehicle after the lessee has taken delivery of the vehicle; (3) provide the loan of an automobile during servicing of the leased vehicle; (4) purchase insurance for the lessee; or (5) provide for the renewal of the vehicle's license merely as a service to the lessee where the lessee could renew the license without authorization from the lessor. The company may arrange for a third party to provide these services or products.

(B) The estimated residual value of property for purposes of paragraph (b)(3)(iii)(A) of this section shall not exceed 25 percent of the acquisition cost of the property to the lessor.

(9) Operating nonbank depository institutions

(i) Industrial banking. Owning, controlling, or operating an industrial bank, Morris Plan bank, or industrial loan company that is not a bank for purposes of the BHC Act.

(ii) Operating savings associations. Owning, controlling, or operating a savings association.

(10) Trust company functions. Performing functions or activities that may be performed by a trust company (including activities of a fiduciary, agency, or custodial nature), in the manner authorized by federal or state law that is not a bank for purposes of section 2(c) of the Bank Holding Company Act.

(11) Financial and investment advisory activities. Acting as investment or financial advisor to any person, including (without, in any way, limiting the foregoing):

(i) Serving as investment adviser (as defined in section 2(a)(20) of the Investment Company Act of 1940, 15 U.S.C. 80a-2(a)(20)), to an investment company registered under that act, including sponsoring, organizing, and managing a closed-end investment company;

(ii) Furnishing general economic information and advice, general economic statistical forecasting services, and industry studies;

(iii) Providing advice in connection with mergers, acquisitions, divestitures, investments, joint ventures, leveraged buyouts, recapitalizations, capital structurings, financing transactions and similar transactions, and conducting financial feasibility studies;⁴

(iv) Providing information, statistical forecasting, and advice with respect to any transaction in foreign exchange, swaps, and similar transactions, commodities, and any forward contract, option, future, option on a future, and similar instruments;

(v) Providing educational courses, and instructional materials to consumers on individual financial management matters; and

(vi) Providing tax-planning and tax-preparation services to any person.

(12) Agency transactional services for customer investments.

⁴ Feasibility studies do not include assisting management with the planning or marketing for a given project or providing general operational or management advice.

(i) Securities brokerage. Providing securities brokerage services (including securities clearing and/or securities execution services on an exchange), whether alone or in combination with investment advisory services, and incidental activities (including related securities credit activities and custodial services).

(ii) Riskless principal transactions. Buying and selling in the secondary market all types of securities on the order of customers as a “riskless principal” to the extent of engaging in a transaction in which the company, after receiving an order to buy (or sell) a security from a customer, purchases (or sells) the security for its own account to offset a contemporaneous sale to (or purchase from) the customer.

(iii) Private placement services. Acting as agent for the private placement of securities in accordance with the requirements of the Securities Act of 1933 (1933 Act) and the rules of the Securities and Exchange Commission.

(iv) Futures commission merchant. Acting as a futures commission merchant (FCM) for unaffiliated persons in the execution, clearance, or execution and clearance of any futures contract and option on a futures contract.

(v) Other transactional services. Providing to customers as agent transactional services with respect to swaps and similar transactions, any transaction described in paragraph (b)(8) of this section, any transaction that is permissible for a state member bank, and any other transaction involving a forward contract, option, futures, option on a futures or similar contract (whether traded on an exchange or not).

(13) Investment transactions as principal.

(i) Underwriting and dealing in government obligations and money market instruments.

Underwriting and dealing in obligations of the United States, general obligations of states and their political subdivisions, and other obligations that state member banks of the Federal Reserve System may be authorized to underwrite and deal in under 12 U.S.C. 24 and 335, including banker's acceptances and certificates of deposit.

(ii) Investing and trading activities. Engaging as principal in:

(A) Foreign exchange;

(B) Forward contracts, options, futures, options on futures, swaps, and similar contracts, whether traded on exchanges or not, based on any rate, price, financial asset (including gold, silver, platinum, palladium, copper, or any other metal), nonfinancial asset, or group of assets.

(C) Forward contracts, options, futures, options on futures, swaps, and similar contracts, whether traded on exchanges or not, based on an index of a rate, a price, or the value of any financial asset, nonfinancial asset, or group of assets.

(ii) Buying and selling bullion, and related activities. Buying, selling and storing bars, rounds, bullion, and coins of gold, silver, platinum, palladium, copper, and any other metal for the company's own account and the account of others, and providing incidental services such as arranging for storage, safe custody, assaying, and shipment.

(14) Management consulting and counseling activities

(i) Management consulting. (A) Providing management consulting advice:⁵

(1) On any matter to unaffiliated depository institutions, including commercial banks, savings and loan associations, savings banks, credit unions, industrial banks, Morris Plan banks, cooperative banks, industrial loan companies, trust companies, and branches or agencies of foreign banks;

(2) On any financial, economic, accounting, or audit matter to any other company.

(ii) Employee benefits consulting services. Providing consulting services to employee benefit, compensation and insurance plans, including designing plans, assisting in the implementation of plans, providing administrative services to plans, and developing employee communication programs for plans.

(iii) Career counseling services. Providing career counseling services to:

(A) A financial organization⁶ and individuals currently employed by, or recently displaced from, a financial organization;

(B) Individuals who are seeking employment at a financial organization; and

(C) Individuals who are currently employed in or who seek positions in the finance, accounting, and audit departments of any company.

⁵ In performing this activity, companies are not authorized to perform tasks or operations or provide services to client institutions either on a daily or continuing basis, except as necessary to instruct the client institution on how to perform such services for itself. See also the Board's interpretation of bank management consulting advice (12 CFR 225.131).

⁶ Financial organization refers to insured depository institution holding companies and their subsidiaries, other than nonbanking affiliates of diversified savings and loan holding companies that engage in activities not permissible under section 4(c)(8) of the Bank Holding Company Act (12 U.S.C. 1842(c)(8)).

(15) Support services.

(i) Courier services. Providing courier services for:

(A) Checks, commercial papers, documents, and written instruments (excluding currency or bearer-type negotiable instruments) that are exchanged among banks and financial institutions; and

(B) Audit and accounting media of a banking or financial nature and other business records and documents used in processing such media.⁷

(ii) Printing and selling MICR-encoded items. Printing and selling checks and related documents, including corporate image checks, cash tickets, voucher checks, deposit slips, savings withdrawal packages, and other forms that require Magnetic Ink Character Recognition (MICR) encoding.

(16) Insurance agency and underwriting.

(i) Credit insurance. Acting as principal, agent, or broker for insurance (including home mortgage redemption insurance) that is:

(A) Directly related to an extension of credit by the company or any of its subsidiaries; and

(B) Limited to ensuring the repayment of the outstanding balance due on the extension of credit⁸ in the event of the death, disability, or involuntary unemployment of the debtor.

(ii) Finance company subsidiary. Acting as agent or broker for insurance directly related to an extension of credit by a finance company⁹ that is a subsidiary of a company, if:

(A) The insurance is limited to ensuring repayment of the outstanding balance on such extension of credit in the event of loss or damage to any property used as collateral for the extension of credit; and

⁷ See also the Board's interpretation on courier activities (12 CFR 225.129), which sets forth conditions for company entry into the activity.

⁸ Extension of credit includes direct loans to borrowers, loans purchased from other lenders, and leases of real or personal property so long as the leases are nonoperating and full-payout leases that meet the requirements of paragraph (b)(3) of this section.

⁹ Finance company includes all non-deposit-taking financial institutions that engage in a significant degree of consumer lending (excluding lending secured by first mortgages) and all financial institutions specifically defined by individual states as finance companies and that engage in a significant degree of consumer lending.

(B) The extension of credit is not more than \$10,000, or \$25,000 if it is to finance the purchase of a residential manufactured home¹⁰ and the credit is secured by the home; and

(C) The applicant commits to notify borrowers in writing that:

(1) They are not required to purchase such insurance from the applicant;

(2) Such insurance does not insure any interest of the borrower in the collateral; and

(3) The applicant will accept more comprehensive property insurance in place of such single-interest insurance.

(iii) Insurance in small towns. Engaging in any insurance agency activity in a place where the company or a subsidiary has a lending office and that:

(A) Has a population not exceeding 5,000 (as shown in the preceding decennial census); or

(B) Has inadequate insurance agency facilities, as determined by the Board, after notice and opportunity for hearing.

(iv) Insurance-agency activities conducted on May 1, 1982. Engaging in any specific insurance-agency activity¹¹ if the company, or subsidiary conducting the specific activity, conducted such activity on May 1, 1982, or received Board approval to conduct such activity on or before May 1, 1982.¹² A company or subsidiary engaging in a specific insurance agency activity under this clause may:

(A) Engage in such specific insurance agency activity only at locations:

(1) In the state in which the company has its principal place of business (as defined in 12 U.S.C. 1842(d));

¹⁰ These limitations increase at the end of each calendar year, beginning with 1982, by the percentage increase in the Consumer Price Index for Urban Wage Earners and Clerical Workers published by the Bureau of Labor Statistics.

¹¹ Nothing contained in this provision shall preclude a company subsidiary that is authorized to engage in a specific insurance-agency activity under this clause from continuing to engage in the particular activity after merger with an affiliate, if the merger is for legitimate business purposes and prior notice has been provided to the Board.

¹² For the purposes of this paragraph, activities engaged in on May 1, 1982, include activities carried on subsequently as the result of an application to engage in such activities pending before the Board on May 1, 1982, and approved subsequently by the Board or as the result of the acquisition by such company pursuant to a binding written contract entered into on or before May 1, 1982, of another company engaged in such activities at the time of the acquisition.

- (2) In any state or states immediately adjacent to such state; and
- (3) In any state in which the specific insurance-agency activity was conducted (or was approved to be conducted) by such company or subsidiary thereof or by any other subsidiary of such company on May 1, 1982; and
- (B) Provide other insurance coverages that may become available after May 1, 1982, so long as those coverages insure against the types of risks as (or are otherwise functionally equivalent to) coverages sold or approved to be sold on May 1, 1982, by the company or subsidiary.
- (v) Supervision of retail insurance agents. Supervising on behalf of insurance underwriters the activities of retail insurance agents who sell:
- (A) Fidelity insurance and property and casualty insurance on the real and personal property used in the operations of the company or its subsidiaries; and
- (B) Group insurance that protects the employees of the company or its subsidiaries.
- (vi) Small companies. Engaging in any insurance-agency activity if the company has total consolidated assets of \$50 million or less. A company performing insurance-agency activities under this paragraph may not engage in the sale of life insurance or annuities except as provided in paragraphs (b)(11) (i) and (iii) of this appendix, and it may not continue to engage in insurance-agency activities pursuant to this provision more than 90 days after the end of the quarterly reporting period in which total assets of the holding company and its subsidiaries exceed \$50 million.
- (vii) Insurance-agency activities conducted before 1971. Engaging in any insurance-agency activity performed at any location in the United States directly or indirectly by a company that was engaged in insurance-agency activities prior to January 1, 1971, as a consequence of approval by the Board prior to January 1, 1971.
- (17) Community development activities.
- (i) Financing and investment activities. Making equity and debt investments in corporations or projects designed primarily to promote community welfare, such as the economic rehabilitation and development of low-income areas by providing housing, services, or jobs for residents.
- (ii) Advisory activities. Providing advisory and related services for programs designed primarily to promote community welfare.
- (18) Money orders, savings bonds, and traveler's checks. The issuance and sale at retail of money orders and similar consumer-type payment instruments; the sale of U.S. savings bonds; and the issuance and sale of traveler's checks.

- (19) Data processing. Providing data processing, data storage and data transmission services, facilities (including data processing, data storage and data transmission hardware, software, documentation, or operating personnel), databases, advice, and access to such services, facilities, or data-bases by any technological means, if the data to be processed, stored or furnished are financial, banking or economic.
- (20) Providing administrative and other services to mutual funds.
- (21) Owning shares of a securities exchange.
- (22) Acting as a certification authority for digital signatures and authenticating the identity of persons conducting financial and nonfinancial transactions.
- (23) Providing employment histories to third parties for use in making credit decisions and to depository institutions and their affiliates for use in the ordinary course of business.
- (24) Check cashing and wire transmission services.
- (25) In connection with offering banking services, providing notary public services, selling postage stamps and postage-paid envelopes, providing vehicle registration services, and selling public transportation tickets and tokens.
- (26) Real estate title abstracting.
- (27) Providing management consulting services, including to any person with respect to nonfinancial matters, so long as the management consulting services are advisory.
- (28) Operating a travel agency in connection with financial services.
- (29) Organizing, sponsoring, and managing a mutual fund.
- (30) Directly, or indirectly acquiring or controlling, whether as principal, on behalf of 1 or more entities, or otherwise, shares, assets, or ownership interests (including debt or equity securities, partnership interests, trust certificates, or other instruments representing ownership) of a company or other entity, whether or not constituting control of such company or entity, if:
- (i) Such shares, assets, or ownership interests are acquired and held as part of a bona fide underwriting or merchant or investment banking activity, including investment activities engaged in for the purpose of appreciation and ultimate resale or disposition of the investment;
 - (ii) Such shares, assets, or ownership interests are held for a period of time to enable the sale or disposition thereof on a reasonable basis consistent with the financial viability of the activities described in paragraph (30)(i) of this appendix; and

(iii) During the period such shares, assets, or ownership interests are held, the company does not routinely manage or operate such company or entity except as may be necessary or required to obtain a reasonable return on investment upon resale or disposition.

(31) Directly or indirectly acquiring or controlling, whether as principal, on behalf of 1 or more entities, or otherwise, shares, assets, or ownership interests (including debt or equity securities, partnership interests, trust certificates or other instruments representing ownership) of a company or other entity, whether or not constituting control of such company or entity if—

(i) Such shares, assets, or ownership interests are acquired and held by an insurance company that is predominantly engaged in underwriting life, accident and health, or property and casualty insurance (other than credit-related insurance) or providing and issuing annuities;

(ii) Such shares, assets, or ownership interests represent an investment made in the ordinary course of business of such insurance company in accordance with relevant State law governing such investments; and

(iii) During the period such shares, assets, or ownership interests are held, the company does not routinely manage or operate such company except as may be necessary or required to obtain a reasonable return on investment.

(32) Lending, exchanging, transferring, investing for others, or safeguarding financial assets other than money or securities.

(33) Providing any device or other instrumentality for transferring money or other financial assets.

(34) Arranging, effecting, or facilitating financial transactions for the account of third parties.

By order of the Board of Governors of the Federal Reserve System, April 2, 2012.

Robert deV. Frierson,
Deputy Secretary of the Board.

BILLING CODE 6210-01-P

[FR Doc. 2012-8515 Filed 04/09/2012 at 8:45 am; Publication Date: 04/10/2012]